IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

Number_____

JAMES VAN GILDER,
Petitioner,
vs.
AMERICAN SURETY COMPANY,
OF NEW YORK, a New York Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH DISTRICT

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, JAMES VAN GILDER, respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth District, to review a decision rendered November 6th, 1940 reversing a judgment of the United States District Court for the Eastern District of Michigan, Southern Division; American Surety Company of New York v. Van Gilder, 115 Fed. (2d) 200.

SUMMARY STATEMENT OF THE MATTER INVOLVED

(Figures in parentheses refer to pages of the printed record unless context clearly denotes otherwise)

Two main questions are presented by the decision of the Circuit Court of Appeals:

1. The primary question presented by the decision

of the Circuit Court of Appeals is whether the Federal courts are bound to recognize a statute of the state of Michigan and the interpretation placed thereon by the Michigan Supreme Court, that the going without the jail limits of a judgment debtor shall be deemed an escape of such prisoner, imposing liability upon the sheriff therefor?

2. Is not a sheriff who by statute is held guilty of an escape, necessarily guilty of nonfeasance in office imposing liability upon the surety on his official bond?

These questions arise from a series of litigation the facts concerning which are not in dispute (60).

Petitioner recovered judgment in an action of trespass on the case against one Howard Sturgis in the Circuit Court for the County of Ingham (14). Based upon such judgment a writ of capias ad satisfaciendum was issued to John S. Barnes, sheriff of the county of Clinton, state of Michigan, and was duly served by his deputy by the taking of Howard Sturgis into his custody (16, 17). Thereafter a jail limits bond was executed in favor of the sheriff and said Howard Sturgis was permitted the liberties of the jail limits (37, 38). On December 16, 1937 said Howard S. Sturgis went without the jail limits of the county of Clinton without the assent of petitioner, the judgment creditor, and suit was instituted against John S. Barnes who is still sheriff of Clinton county, based upon such escape (21, 23). Following appeal, such suit resulted in judgment in favor of petitioner against such sheriff (29). Later, the instant suit was instituted against respondent, surety upon the official bond of said sheriff to recover the amount of such judgment (1, 5). Following the removal of the suit to the United States District Court for the Eastern District of Michigan, Southern Division by reason of diversity of citizenship, issue was joined and both parties filed motions for summary judgment (11, 39). There was filed in support of plaintiff's motion, affidavits of witnesses to the issues involved (30, 33) as well as certified copies of the original judgment against said Howard Sturgis (15) the writ of capias

ad satisfaciendum with the sheriff's return thereon (16, 17) and certified copies of the pleadings and judgment in the suit against the sheriff (23-30).

The district court held that inasmuch as under the law of Michigan the sheriff is liable for such escape, and inasmuch as such liability is predicated upon the failure of the sheriff to faithfully perform and execute his office, and inasmuch as such holding by the state court was binding upon the federal court, therefore it must be held that the condition of the sheriff's official bond had been breached (62, 63) and he accordingly granted petitioner's motion and entered judgment in his behalf (69).

GROUNDS FOR GRANTING THE WRIT

The Writ of Certiorari is accordingly sought on the grounds:

1. The decision of the Circuit Court of Appeals that the escape of a judgment debtor did not result in a breach of the official bond of the sheriff imposing liability upon the surety upon his official bond, was in conflict with applicable decisions of the Supreme Court of the State of Michigan.

2. The Federal Court is bound by the interpretation given the Michigan statute by decisions of the Michigan Supreme Court and the holding of the Michigan courts to the effect that such liability upon the part of the sheriff is predicated on breach of his official duty.

3. The Circuit Court of Appeals in its opinion ignored the basis of the sheriff's liability under the Michigan statute which is breach of official duty in permitting the escape.

4. The opinion of the Circuit Court of Appeals is in conflict with decisions of the Michigan Supreme Court which hold that Michigan by enacting this statute has adopted the common law action of escape, violation of which necessarily involved breach of official duty and constitutes nonfeasance in office.

5. Although respondent, by executing as surety, the official bond of the sheriff undertook thereby to indemnify any person unlawfully injured by its principal's nonfeasance in office, nevertheless the effect of the decision of the Circuit Court of Appeals is to relieve such surety from liability for a judgment against its principal although that judgment is predicated upon the nonfeasance of the sheriff in the performance of his official duties.

WHEREFORE your petitioner prays that a writ of certiorari issue under the seal of this court directed to the United States Circuit Court of Appeals for the sixth circuit, commanding said court to certify and transmit to this honorable court a full and complete transcript of the record of said cause, numbered and titled on its docket as "American Surety Company of New York, a New York corporation, Appellant, v. James Van Gilder, Appellee, Number 8579" and that the judgment of said Circuit Court of Appeals may be reversed by this Honorable Court, and that your petitioner be granted such other and further relief as he may be entitled to under the facts and law.

Respectfully sumbitted,

PLUMMER SNYDER,
JOSEPH W. PLANCK,
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Of Counsel.